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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALONSO MOLINA, Defendant and Appellant.	C032811 (Super. Ct. No. SCO63596A)

APPEAL from a judgment of the Superior Court of San Joaquin County. Honorable Richard M. Mallett, Judge. Affirmed.

David L. Saine, under appointment by the Court of Appeal, for Defendant and Appellant Luis Alonso Molina.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, Robert M. Morgester, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the FACTUAL AND PROCEDURAL BACKGROUND and part I of the DISCUSSION.

Defendant Luis Alonso Molina appeals from the judgment and sentence imposed following his conviction for driving under the influence of alcohol (Veh. Code, § 23152, subd. (a))[1] and driving with a prohibited blood alcohol level of 0.08 percent or more (§ 23152, subd. (b)). Defendant contends the trial court erred in (1) refusing to instruct the jury on the defense of necessity, and (2) instructing the jury with CALJIC No. 17.41.1 (juror misconduct), which assertedly impinged upon defendant's Sixth and Fourteenth Amendment rights to have a unanimous jury and a jury free to use its power of nullification.

In the unpublished portion of the opinion, we shall conclude the trial court did not err in refusing the necessity instruction. In the published portion of the opinion, we shall conclude that, assuming for the sake of argument that CALJIC No. 17.41.1 is defective, reversal is not required if the giving of the instruction was harmless beyond a reasonable doubt, as it was in the case before us. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with (1) driving under the influence of alcohol in violation of section 23152, subdivision (a), and (2) driving with a blood alcohol level of 0.08 percent or more in violation of section 23152, subdivision (b). As to each count, it was alleged for enhancement purposes (former

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[1] Undesignated statutory references are to the Vehicle Code.

§ 23175.5;[2] see now, § 23550.5) that defendant had a prior drunk driving (DUI) conviction in 1997. Defendant admitted the prior DUI.

The following evidence was adduced at trial:

At approximately 2:30 a.m. on August 17, 1998, a California Highway Patrol (CHP) patrol car was on patrol in an incorporated area of Stockton, in which there were often drunk drivers at that time of night after the bars closed. The officers saw a pickup truck traveling at 35 miles per hour, in the furthest left lane of the two southbound lanes of Airport Way. The truck weaved over the right lane line twice. When first observed by the CHP officers, the truck was 200 feet south of the Tropicana Club, with no vehicles behind it. The CHP car followed the truck for about one-tenth of a mile. The officers activated the patrol car's roof lights as the truck was turning into the left-turn lane of the road. After the traffic light changed, the truck made a left turn, turned down the first street to the right, pulled over to the curb and stopped. The driver, later

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[2] Former section 23175.5, at the time in question, provided "(a) A person is guilty of a public offense punishable by imprisonment in the state prison or by imprisonment for not more than one year in the county jail and by a fine . . . if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of [a prior felony drunk driving conviction]. [¶] (b) Any person convicted of a violation of Section 23152 that is punishable under this section shall be designated an habitual traffic offender for a period of three years, subsequent to the conviction. . . ." (Stats. 1997, ch. 901, § 6; repealed by Stats. 1998, ch. 118, § 41.5, operative July 1, 1999; see now, § 23550.5.)

identified as defendant, had red eyes and a strong odor of beer on his breath. In response to the officers' questions, defendant said he was coming from the Tropicana Club and was going home. He said he had had two drinks of bourbon, starting at 1:00 a.m. and finishing at about 1:30 a.m. Defendant failed field sobriety tests. Defendant was arrested for driving under the influence of alcohol. The passenger in the pickup truck, initially identified as Mr. Oberra, was extremely intoxicated and was taken home. Breathalyzer tests performed less than an hour after defendant's arrest indicated blood alcohol levels of .18 and .20 (which according to a criminalist's testimony indicated consumption of at least seven alcoholic drinks).

Defendant testified he went to the Tropicana Club that night with his friend Demetrio, in Demetrio's pickup truck. Defendant did not drive because he lost his license as a result of a prior drunk driving offense. During the evening, defendant danced and had two drinks of brandy and coke with lots of ice. He did not think he was drunk. At closing time, defendant found Demetrio in the parking lot engaged in a heated argument with a group of people near a van. Defendant believed the argument was over a woman. He heard people cursing at Demetrio and threatening to "take it down and open his ass," which defendant interpreted as a threat to kill Demetrio. Defendant also saw someone punch Demetrio in the chest. Demetrio tried to punch back, but defendant got in the middle to separate them. The club owner, Armando, came over and told defendant "you got to get out of here right now," convincing defendant that he and

Demetrio had to leave for their own safety.[3] The club owner was reputed to carry a gun, and defendant heard someone in the crowd say they should take the gun from him. Defendant was scared. He, Demetrio, and the woman went toward the truck, but defendant told the woman to leave and took the keys from Demetrio, who was too drunk to drive. The woman left in the van with one man, but others remained in the parking lot. Defendant and Demetrio were in the truck with the doors locked. Several people came to the truck and said "Come out." Although defendant did not feel drunk, he knew he should not drive because he had been drinking and did not have a driver's license due to a prior drunk driving conviction. Nevertheless, defendant felt he had no alternative but to drive his friend's truck to safety.

After defendant drove a short distance, Demetrio opened the truck door while the truck was still moving, indicating he wanted to get a taco from a taco truck, so defendant stopped the car at the northeast corner of the Tropicana Club's premises. Demetrio got out of the truck. Defendant thought he was returning to fight with some of the people who were still in the parking lot. Defendant waited for Demetrio with the engine running. Defendant saw the CHP car parked across the street, northbound on Airport Way. After a couple of minutes, Demetrio

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[3] At trial, the club owner testified in corroboration that after he closed the club, he encountered in the parking lot people coming from the adjacent fairgrounds. The club owner saw the dispute brewing in the parking lot and, not wanting any problems with the police, told defendant to get his friend out of there.

returned. Defendant told Demetrio there was a problem because of the CHP presence and because defendant did not have a valid driver's license. Demetrio was concerned because he had not entered the country legally. Defendant pulled the truck onto Airport Way southbound and saw the CHP car make a U-turn across the center divider and begin following the truck. When asked at trial why he did not go to the CHP officers for protection from the asserted danger, defendant testified that although he never runs away from the law, he was worried he would get in trouble for violation of probation and driving without a license, and he was worried about his friend.

The trial court refused defendant's request for a jury instruction on the defense of necessity, as we discuss *post*.

The jury found defendant guilty on both counts (driving under the influence of alcohol and driving with a prohibited blood alcohol level).

The trial court suspended defendant's driver's license for five years and sentenced defendant to a middle term of two years on count one, and a concurrent two-year term on count two. The court noted there was no additional prison time imposed for the enhancements for the prior DUI conviction.

DISCUSSION

I. Necessity Defense

Defendant argues the trial court erred in refusing his

request that the jury be instructed on the defense of necessity, pursuant to CALJIC No. 4.43.[4] We disagree.

"Except as to crimes that include lack of necessity (or good cause) as an element, necessity is an affirmative defense recognized based on public policy considerations. [Citations.] To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially contribute to the emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1134-1135.)

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[4] CALJIC No. 4.43 provides: "A person is not guilty of a crime when [he] [she] engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely: [¶] 1. The act charged as criminal was done to prevent a significant and imminent evil, namely, [a threat of bodily harm to oneself or another person] [or] [__]; [¶] 2. There was no reasonable legal alternative to the commission of the act; [¶] 3. The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; [¶] 4. The defendant entertained a good-faith belief that [his] [her] act was necessary to prevent the greater harm; [¶] 5. That belief was objectively reasonable under all the circumstances; and [¶] 6. The defendant did not substantially contribute to the creation of the emergency." (Orig. brackets.)

Kearns involved a defendant who robbed convenience stores. She claimed she was forced to do so by a man who beat her, threatened to kill her, and waited outside in a car while she went into the stores to rob them. *Kearns* held the trial court did not err in failing to instruct sua sponte on the necessity defense, and defense counsel was not ineffective for failing to request the instruction, where the evidence was insufficient to permit a reasonable jury to find the absence of a reasonable legal alternative. (*Id*. at p. 1135.) The appellate court said "at least one such alternative existed, to wit, asking the victim to call the police rather than carrying out the robbery." (*Ibid*.)

Here, the prosecutor opposed defendant's request for instruction on the necessity defense, pointing out "[b]y the defendant's own admission, even if you are to believe the situation at the Tropicana Club, he subsequently reached a place of safety and was no longer in threat or danger of being attacked or in fear of his life. At that point once he begins driving, there is no longer any necessity defense." The trial court said that was a fair statement and asked defense counsel "what do you think? Because the defendant has testified to two separate incidents of driving. The first incident . . . is the incident where he and his friend Demetrio are trying to get away from the group of people who came out of the van. There's a dispute about a woman. And the testimony, in substance, was there was an altercation. . . . [¶] However, after that, it's the defendant's testimony, not that of others, he did stop the

car and Demetrio exited. At that second point where the defendant stopped the car, he's aware of the CHP not too far away." The court noted that absence of a reasonable legal alternative is a prerequisite for the necessity defense, and case law indicated the alternative of seeking police intervention was a reasonable legal alternative defeating the necessity defense, and "there is a very clear situation here where the defendant is aware of the presence of the CHP a short distance away. And is that not the legal alternative that he had available . . . ?" The court asked: "Isn't [defendant's] reasonable alternative at that point to go and see the officers rather than to keep driving the car a second time?" Defense counsel argued the matter should be submitted to the jury. The trial court indicated the necessity defense could not be submitted to the jury if a reasonable legal alternative existed. The court said: "Demetrio is out of the car. He's gone for two minutes. The defendant's parked looking at the officers who were parked on the opposite side of the street, a short distance away. What necessity can there be for the defendant to continue to drive when the most reasonable legal alternative would be to say, 'Gentlemen,' meaning the CHP, 'we've got a situation here. These people are following me and even if they aren't following me, I don't want Demetrio to drive.' That's the most reasonable alternative." The trial court concluded: "I'm not going to give [jury instruction on] the necessity defense because it doesn't meet element 2 [absence of reasonable legal alternative] here. . . . [Case law] talks about a situation where the

defendant argued there was no legal alternative because the police wouldn't show up on time based on his prior experience with them. In this case it's not a close call because the CHP is right there. . . . [T]he defendant's most reasonable alternative, is simply to get the officers' attention, who are parked a short distance away . . . ."

Although there was no instruction on necessity, defense counsel argued necessity in closing argument to the jury.

We agree with the trial court's analysis that defendant was not entitled to a jury instruction on the necessity defense. By defendant's own testimony, a reasonable legal alternative existed to wit, going to the CHP vehicle, which was parked across the street, rather than driving away from the CHP. Because the evidence showed without dispute a reasonable alternative to commission of a crime, the necessity defense was inapplicable. (*People v. Kearns, supra,* 55 Cal.App.4th at p. 1135.)

On appeal, defendant does not point to any evidence making resort to the CHP an unreasonable legal alternative. Rather, he merely cites evidence that it was reasonable for him still to be fearful of the men in the parking lot the second time he drove--after Demetrio left and returned to the truck and after defendant saw the CHP car. He points out his location was near the only exit from the parking lot, so that the "angry crowd" could only leave by passing him. Even assuming for the sake of argument that defendant still had reason to be fearful of the men in the parking lot, that says nothing about the absence of a

reasonable alternative to his action of pulling out onto Airport Way and driving away. The presence of the men in the parking lot did not make it necessary for defendant to drive away despite the presence of the CHP.

Under a different heading in his appellate brief, defendant suggests that seeking CHP assistance was not a reasonable legal alternative for him because (1) he was from Honduras, while the members of the crowd were Mexican, (2) his companion was in the United States illegally, and (3) he (defendant), having been previously arrested for DUI, could reasonably have been fearful and apprehensive of the CHP, viewing its officers as "the enemy" rather than allies in a dangerous situation. However, defendant cites no fact or law making ethnicity a pertinent factor, and he develops no argument as to whether reasonableness of the legal alternative is to be judged with reference to his own prior criminality or that of his companion. We therefore need not address the matter. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [reviewing court may disregard points perfunctorily asserted without development].) For the same reason, we need not address defendant's complaint that the trial court allowed the attorneys to argue the matter of necessity to the jury despite the absence of jury instructions on the matter.

We conclude the trial court properly refused to instruct the jury on the necessity defense.

II. CALJIC No. 17.41.1

The trial court instructed the jury with CALJIC No. 17.41.1, as follows:

"The integrity of a trial requires that jurors, at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

Defendant contends the instruction violated his federal constitutional rights and the erroneous giving of the instruction constitutes per se reversible error.

The California Supreme Court currently has under review the issue of whether CALJIC No. 17.41.1 violates a defendant's constitutional rights regarding jury trial. (E.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, rev. granted 4/26/00 (S086462), further action deferred pending disposition in *People v. Metters*, 61 Cal.App.4th 1489, S069442, and *People v. Cleveland*, S078537.)

We shall assume for the sake of argument that CALJIC No. 17.41.1 should not have been given. We shall conclude the error was not reversible per se but was subject to harmless error analysis. We shall further assume applicability of the standard most favorable to defendant, i.e., the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]), and conclude

reversal is not required in this case because any error in giving the instruction was harmless beyond a reasonable doubt.[5]

Any error in giving the instruction was not reversible per se under federal constitutional analysis. "[A]s a general rule, . . . 'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.' [Citation.]" (*People v. Flood* (1998) 18 Cal.4th 470, 492, citing *Rose v. Clark* (1986) 478 U.S. 570, 579 [92 L.Ed.2d 460].)

The California Supreme Court in *Flood* went on to summarize United States Supreme Court development of the law in this area, as follows:

"In *Arizona v. Fulminante* [1991] 499 U.S. 279 [113 L.Ed.2d 302], a decision holding that the erroneous admission of a

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[5] The People advocate the lesser standard of reasonable likelihood of a more favorable result. We note federal courts have applied the *Chapman* standard where the only possible effect of an erroneous jury instruction was to minimize the possibility of jury nullification. (E.g., *United States v. Franzen* (7th Cir. 1982) 688 F.2d 1181, 1185-1187 [discussing harmless error when trial court refuses to allow "not guilty" verdict because defendant admits criminal acts].)

coerced confession is not reversible per se, the court elaborated upon harmless error analysis by distinguishing between 'trial errors,' which are subject to the general rule that a constitutional error does not require automatic reversal, and 'structural' errors, which 'defy analysis by harmless-error standards' and require reversal without regard to the strength of the evidence or other circumstances. [Citation.] *Fulminante* characterized trial errors as those that occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt.' [Citation.] Structural errors, on the other hand, are 'structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' [Citation.] The court noted examples of trial errors, including erroneous jury instructions [citation], as well as structural errors, which include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. [Citation.] With regard to such structural errors, *Fulminante* explained: '"'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"' [Citation.]" (*Flood, supra*, 18 Cal.4th at p. 493.)

As examples of structural error, the United States Supreme Court has noted by way of example that "where th[e] right [to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." (*Rose v. Clark, supra*, 478 U.S. at p. 578.) Where demonstration of prejudice is "a practical impossibility, prejudice must necessarily be implied." (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9 [81 L.Ed.2d 31] [denial of right to public trial].) "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [79 L.Ed.2d 122].)

Flood, supra, 18 Cal.4th 470, went on to observe "the United States Supreme Court made clear that at least one type of instructional error may amount to a structural defect in the trial mechanism that requires reversal regardless of the strength of the evidence of the defendant's guilt. In *Sullivan v. Louisiana* [1993] 508 U.S. 275 [124 L.Ed.2d 182], the trial court gave a constitutionally deficient reasonable doubt instruction. In explaining why *Chapman* harmless error analysis cannot be applied to such an error, *Sullivan* stated: 'Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in

other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.' [Citation.] Because a constitutionally defective reasonable doubt instruction renders it impossible for the jury to return a verdict of guilty beyond a reasonable doubt, 'there is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt--not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.' [Citation.]" (*Flood, supra*, 18 Cal.4th at p. 494, orig. italics, citing *Sullivan v. Louisiana, supra*, 508 U.S. 275, 280-281 [124 L.Ed.2d 182].) The California Supreme Court has interpreted United States Supreme Court authority as indicating "instructional errors--whether misdescriptions, omissions, or presumptions--as a general matter fall within the broad category of trial errors

subject to *Chapman* review on direct appeal." (*Flood, supra*, 18 Cal.4th at p. 499.)

Flood involved a prosecution for evading peace officers, where the trial court did not instruct the jurors to decide whether the police were "peace officers" but instead informed the jurors that the police who chased the defendant were "peace officers." The California Supreme Court held that, although the trial court committed constitutional error in violation of the defendant's due process right to have the jury decide each element of the offense, the error was not "structural error," hence, not reversible per se, but rather was subject to harmless error analysis under the *Chapman* standard. (*Flood, supra*, 18 Cal.4th at pp. 502-503.)

The United States Supreme Court has endorsed a categorical approach to structural errors, i.e., a particular error is either structural or it is not, regardless of the facts of the particular case. (*Neder v. United States* (1999) 527 U.S. 1 [144 L.Ed.2d 35, 50] [in criminal tax fraud case, trial court's refusal to submit materiality issue to jury was not structural error].)

Here, defendant argues the asserted error in instructing the jury with CALJIC No. 17.41.1 is error of federal constitutional magnitude which directly implicated his Sixth Amendment right to trial by jury and Fourteenth Amendment right to a fair trial. He argues jury nullification is implicit in his Sixth Amendment rights. He argues CALJIC No. 17.41.1 invites jurors in the majority to coerce holdout jurors into

agreeing with the majority and intrudes into the deliberative process. He also mentions the California Constitution but provides no separate analysis.

Defendant submits the error is one which defies assessment of its actual impact on the jury, hence is "structural error" which is reversible per se, without regard to the question of prejudice. Defendant alternatively argues that if the error is subject to harmless-error analysis, the error requires reversal because it was not harmless beyond a reasonable doubt.

However, even assuming for the sake of argument that the giving of CALJIC No. 17.41.1 constitutes constitutional error, it is not "structural error" and does not require reversal per se. All the instruction does is to require jurors to inform the court of juror misconduct. It does not "affect[] the framework within which the trial proceeds," nor does it "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder v. United States, supra*, 527 U.S. at p. 1 [144 L.Ed.2d 35, 46-47], italics omitted; *Flood, supra*, 18 Cal.4th at p. 493.) We do not agree that the instruction is likely to be coercive. Absent misconduct by the jury, expressly identified in the instruction, the instruction is not likely to enter into jury deliberations at all. In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute structural error requiring the reversal of every case in which it is given. We think that such a result would be, frankly, absurd.

Accordingly, we conclude any error in instructing the jury with CALJIC No. 17.41.1 is not reversible per se, but rather is subject to harmless-error analysis.

Assuming applicability of the *Chapman* standard, any error in this case does not require reversal because it was harmless beyond a reasonable doubt. In this case, the jury reached a verdict in less than an hour, with no indication of deadlock or holdout jurors. Thus, the record reflects the jury began deliberations after lunch on April 14, 1999, around 1:30 p.m., and notified the court at 2:21 p.m. that it had reached a verdict. The jury did not communicate with the court during its deliberations. We will not infer that the jury instruction had any impact prejudicing defendant. We reject defendant's speculative assumption that the instruction had a chilling effect on the jurors' deliberations, inhibiting the kind of free expression and interaction among jurors that is so important to the deliberative process. There is no warrant for that view on this record.

We conclude there was no reversible error in this case.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

MORRISON, J.

CALLAHAN, J.